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DISCUSSION

## Defining and identifying threats – a new challenge to old assumptions in the theory and practice of emergency and security law

KARIN LOEVY — 24 September, 2014



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### A reply to Jens Kremer

Jens Kremer raises a problem that is well known in the theory of security and emergency law. Since issues of security are so complex, and often so political, legal institutions, and especially courts, are not prepared to make

decisions on them, the consequence being that courts, overwhelmingly take officials' security-claims for granted. To tackle the problem, Kremer suggests we can use new tools and new concepts, especially Bruce Schneier's idea of *security mindsets*, recognizing that 'security' is driven by different professional and institutional attitudes – and with them different sensitivities and capacities to identify breaches of security. Security is not a fixed concept but is always located in a particular mindset. If courts can identify the specific security mindset at stake, they can make better choices in matters of security.

What Kremer doesn't explain is why should we expect that judges, who are used to deference on security claims, would adopt a critical security mindset perspective. Don't they know already that security has many minds, and meanings and that it is not a fixed concept? Of course they do – see for example Lord Bingham's famous words in *A and Others v Secretary of State for the Home Department*: 'Any prediction about the future behavior of human beings (as oppose to the phases of the moon or high water at London Bridge), is necessarily problematical. Reasonable and informed minds may differ, and a judgment is not shown wrong or unreasonable because that which is thought likely to happen doesn't happen. It would be irresponsible not to err, if at all, on the side of safety' (Para. 29). In other words judges do see that security is a complex and unstable concept, they just don't see themselves institutionally fit to deal with it and choose to defer to state officials who are more 'security minded'.

### **Assuming indefinability**

I believe there is a deeper reason for judges' institutional unwillingness to decide on security matters, a reason that is tied to the background theory and doctrine in this field.

Traditionally, emergency and security law theoreticians are deeply uninterested in the problem of defining and identifying specific threats. They work, in fact, under a strong assumption that emergencies are inherently difficult to define. This is also how they frame the field's problematic – while there is a clear need to define situations in which security measures may be invoked (because of the vast scope of the powers that they call for) the term 'emergency' or 'security' is 'by its nature an elastic concept which may defy precise definition' (Gross and Ni Aolain, *Law in Times of Crisis* at 5, citing a wide variety of authorities: scholars, colonial and postcolonial jurisprudence (Ningkan v. Government of Malaysia (1970) A.C. 379 at 390), and international law instruments; even more famously, see Carl Schmitt's definition of emergency, as a situation which 'cannot be circumscribed factually', 'cannot be codified in the existing order'; it is the ultimate unknowable, an 'other', the exception).

This clear cut common assumption about the indefinability of threats should not come as a surprise – if indeed threats are so hard to define, theoreticians of emergency law can freely engage with what interests them most: in the critical legal tradition, under the influence of Carl Schmitt, it is the borderline concept of 'the exception'. In the legal pragmatic tradition influenced by the American Framers, it is the construction of an all-powerful mechanism that can manage threats of all kind. The real problem of defining the precise nature of security, emergency, disasters and so on, is resisted by a strong attachment to the grand political

projects of containing all imaginable and unimaginable threats.

### **The limits of indefinability**

But the assumption that threats are inherently indefinable is highly problematic and misleading. First, it entrenches in positive law and practice a static and dichotic politics that constantly reaffirms itself – if threats defy precise definitions someone must be appointed to decide that they exist – the executive, most prominently. All regularly capable agents of a given polity – courts, legislators, civil society organizations, the media, and local authorities just to name a few – must defer to his decision.

But even more problematic, the strong assumption that threats are inherently indefinable overshadows, hides and obscures a set of crucially important questions about the nature of the process or multiple processes in which threats are actually defined, detected and declared. These are questions and debates about *the nature of a specific threat*, like that of terrorism, about *the proper process of identifying it*, about *proper methods and procedures of identification*, about *the amount and type of evidence required*, about *standards of overview and review* of such processes, about *the spaces and places for contestation* over identification and declaration of threats and the *actors involved* in them. These questions call for, and bring about, an alternative politics of definitions, an alternative picture of multiple perspectives and competing claims which rather than prove that threats are ‘indefinable’, show why they call for problematization, contestation and debate. Lifting the well-entrenched veil of ‘indefinability’, by stressing the practical problems that the process of definition and identification raise, and expanding

the resources that exist to confront them, is necessary if we want to move forward in our understanding of security and in managing threats.

Karin Loevy is a research scholar at the New York University School of Law and the Coordinator of its JSD Program. The topics here addressed are dealt with at length in the third chapter of her doctoral thesis “From Exception to Containment: On the Dynamic Legal Politics of Emergency Powers”.

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